No. 77-510

IN THE

Supreme Court of the United States

October Term, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF OF THE STATE OF NEW MEXICO IN OPPOSITION

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CITATIONS

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The State of New Mexico does not disagree with the statements of the petitioner pursuant to Rules 40(a) and (b) of the Rules of the Supreme Court.

I. QUESTIONS PRESENTED

1) Whether recreation is among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960?

2) Whether the Winters or reservation doctrine provides the United States not only with rights to the use of that amount of water implicitly necessary to satisfy the purposes for which

the Gila National Forest lands were withdrawn from the public domain, but also provides the United States with rights to the use of whatever amount of water that might be needed to serve individuals making private uses of the forest lands as permittees of the Secretary of Agriculture?

3) Whether "fish purposes" were among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain?

II. STATUTORY PROVISIONS

Act of July 26, 1866 Ch. 262 §9, 14 Stat. 253, 43 U.S.C. §661 (1952); Act of July 9, 1870, Ch. 235 §17, 16 Stat. 218, 30 U.S.C. §52 (1964); Creative Act of March 3, 1891, Ch. 561 §24, 26 Stat. 1103, 16 U.S.C. §471 (1964); Desert Land Act of 1877, Ch. 107 §1, 19 Stat. 377 (orig.), as amended 43 U.S.C. §321 (1962); Organic Administration Act of June 4, 1897, Ch. 251, 30 Stat. 34, 36, 16 U S.C. §§475, 478 and 481; Multiple-Use Sustained Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. §528 (1960). Pertinent text is set forth in Appendix E, pp. 35a to 40a.

III. STATEMENT OF THE CASE

This case deals with the nature and extent of the United States' water rights implicitly reserved for the Gila National Forest pursuant to withdrawals of lands from the public domain under the Organic Administration Act of June 4, 1897. In its statement of the case the United States has misrepresented its presentation to the New Mexico courts of its reserved water right claims:

> In the proceedings before the special master, the United States specified three purposes of the Gila National Forest for which water was necessary: (a) maintenance of an assured flow of 2 cubic feet per second at three separate points on the stream within the national forest to protect the forest from fire and erosion and to keep an endangered species of trout from depletion; (b) recreational uses incidental to hiking, fishing, camping, and hunting by visitors to the national forest; and (c) consumption by stock that graze on rangeland areas within the national forest under permits granted by the Forest. . . ." (Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico, pp. 3–4).

The evidentiary presentation is misrepresented in two ways. Most importantly no evidence was tendered relating to a need for an adjudicated right to minimum instream flows to enable the Forest Service to protect the forest from fire and erosion. In its inventory of claimed reserved water rights the Forest Service listed three minimum instream flows of 2 cfs each for "fish purposes." At trial it was stated that the claimed water uses were needed only to protect a rare and endangered species of trout indigenous to the Gila National Forest. (Transcript of Record, p. 535 and p. 566).

Secondly, the United States never specified the purpose of "recreational use incidental to hiking, fishing, camping, and hunting. . . ." Based upon the naive assumption that Congress had authorized the creation of national forests for the purpose of providing areas for hiking, fishing, camping, and hunting, counsel for the State of New Mexico mistakenly expressed a willingness in a brief before the Special Master to recognize reserved water rights for such purposes.[1] The United States' claims for reserved water rights for recreational uses

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1. As the United States has noted, the concession resulting from counsel's mistake was 'repudiated' when the matter was heard by the district court. Whether the Gila National Forest was reserved from the public domain for recreational purposes was thoroughly argued before the district court and New Mexico Supreme Court.

went far beyond the diminutive amounts of water used by hikers, campers, fishermen, and hunters. Despite the over-appropriated condition of the Rio Mimbres, the Forest Service asserted claims for sufficient reserved water rights to create and maintain four recreational lakes and related facilities (Transcript of Record, pp. 538-565).

The United States' statement of the case is also incorrect with respect to the Special Master's findings and conclusions. The Special Master did not recognize reserved water rights for fire protection, erosion control, and stock grazing, as the Solicitor General states.[2] (Petition, p. 4). On the contrary, in this respect the Master recognized:

> 9) [where water uses had been made for grazing by private individuals] under permit of the United States Forest Service, and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States.
>
> 10) In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511, and 786,[3] and consequently, because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as

2. It should be emphasized that there is no evidence in the record in support of the need for reserved water rights for fire protection or erosion control. No such claims were made; No reserved right is needed to divert water to put out forest fires, and the United States did not introduce evidence relating to erosion or potential erosion in the stretches of mountain stream wherein the minimum instream flows were claimed for "fish purposes."

3. These are the three minimum instream flows thought necessary to protect the endangered species of Gila trout.

> more particularly described above. (Master's Findings of Fact & Conclusions of Law, App. D, p. 33a).

Essentially, the Special Master agreed with the State of New Mexico in his Findings of Fact and Conclusions of Law. In the district court, however, New Mexico objected to the Master's statement that the water rights arising out of non-governmental uses should be adjudicated to the permittees only when "the permit requires that the use be undertaken in compliance with state law. . . ." New Mexico also objected to the Master's recognition of minimum instream flows for "fish purposes," albeit that the Master stated that such rights could be recognized only when their exercise would not interfere with an upstream, junior appropriator under state law.

On June 4 1976, the district court entered its order sustaining New Mexico's objections to the Master's Report. (App. C, pp. 14a-21a). The New Mexico Supreme Court affirmed, holding that the United States has reserved water for the Gila National Forest sufficient to satisfy the purposes for which the forest lands were reserved and withdrawn from the public domain. Those lands, the court concluded, were not and lawfully could not have been withdrawn from the public domain for "fish purposes" and recreation prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960. (App. E, p. 38a).

IV. REASONS FOR DENYING THE WRIT.

1. The New Mexico Supreme Court's decision correctly applies the reservation doctrine to the withdrawals of the Gila National Forest lands from the public domain pursuant to the Organic Administration Act of June 4, 1897.

The United States distorts and hyperbolizes the significance of the New Mexico Supreme Court's decision, concluding that

it "has cut off water to 7,793,195 acres of national forest within [New Mexico]. . . ." (Petition, p. 6). It is urged that the decision "will threaten the ecology" and "impede husbandry." (Id., p. 6). The fish and wildlife will die. Aesthetic and recreational values have been smothered. Unwittingly, according to the United States, New Mexico has cut its own throat.

Sensationalism aside, the record shows that the decision of the New Mexico Supreme Court has not denied any claim of the United States for reserved water rights to protect and improve the Gila National Forest to secure favorable conditions of water flow and to furnish a continuous supply of timber. The decision does not require "each stockowner holding a federal grazing permit to obtain an individual adjudication of his . . . water rights under state law," thus, as the Solicitor argues, placing "an unreasonable burden on federal range management and impair[ing] federal control of federal lands."[4] (Petition, p. 19). Most importantly the decision is not a denial of federal reserved water rights for recreation and the maintenance of minimum instream flows for the preservation of an endangered species of fish; noting the value of such rights, the New Mexico Supreme Court simply refused to give credence to the argument that they can be predicated upon the purposes for which

4. The district court's decision provides for the adjudication of rights to permittees when the facts will show that the water uses have been made by them instead of the Forest Service. With respect to stockwater New Mexico law provides that up to 10 acre feet may be impounded without the necessity of obtaining a permit. Of the 22 claims to water rights for stock watering purposes made by the United States, none would require an impoundment of more than 10 acre feet. Cf., App. D pp. 26a-27a. New Mexico law places no limit on annual consumption from such impoundments, and stockwater rights in any event are not within the embrace of the pleadings below. If any administrative burden would arise, it would not be by the decision of the New Mexico Supreme Court, but rather by the unnecessary adjudication of stockwater rights sought by the United States. The provision in the district court's order would not affect stock watering, grazing, or range management. It is designed to embrace such significant water uses as might be made with respect to a ski resort or mining operation.

national forest lands can be lawfully withdrawn from the public domain.

There is no quarrel with the reservation doctrine. The New Mexico Supreme Court recognizes that "[t]his Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." [*Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, — L.Ed. 2d — (1976)]. The question relates to the application of the doctrine to withdrawals of land for national forests:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated. . . water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created. . . .The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. (Id., p. 141).

In light of the reservation doctrine as defined and developed by this Court, the New Mexico Supreme Court determined that the United States' reserved water rights in the Rio Mimbres drainage for the Gila National Forest were limited to the purposes set out in the Organic Administration Act of 1897, 16 U.S.C. §475:

> Purposes For Which National Forest May Be Established and Administered.
>
> * * * No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flow, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it

> is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the minerals therein or for agricultural purposes, than for forest purposes.

The court concluded that "(t)he Act limits the purpose for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber." (Decision of the New Mexico Supreme Court, App. A, p. 6a). In the United States' Petition the Solicitor General asserts that the New Mexico Supreme Court "discarded without explanation, the first purpose," and concluded, "again without explanation, that neither purpose encompassed use of water for recreation or for maintenance of minimum instream flows." (p. 10). The Solicitor does not point out, however, that the New Mexico Supreme Court, as well as the district court and the Special Master – all of whom agreed on the purposes for which the forest lands could have been withdrawn – reached their decisions after a copious review of the legislative history of the Creative Act of 1891 and the Organic Administration Act of 1897. The legislative history shows unequivocably that the object of "improving and protecting the forest" is a generic statement facilitating the establishment of a forest for the purposes of maximizing the water yield for appropriators under state law and insuring a continuous supply of timber and other forest products for the rapidly growing western states.

All of the committee reports, studies, and correspondence support the decision below. For example, the "Report of the Committee upon the Inauguration of the Forest Policy" (Sen. Doc. No. 105, 55th Cong., 1st Sess. 1897), which precipitated the Organic Administration Act, discussed the twofold principle as follows:

> The influence of forests upon climate, soil, and the flow of water in streams has attracted much attention during the past century . . . .

> Your committee is of the opinion that it is not only desirable but essential to national welfare to protect the forested lands of the public domain, for their influence on the flow of streams and to supply timber and other forest products . . . .
>
> It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of western North America is dependent upon irrigation. (p. 36).[5]

The weakness of the United States' argument in this regard is illustrated by the fact that in its five briefs before the New Mexico courts only two pages were devoted to a discussion of the legislative history of the two Acts. The reason, of course, is that none of the history supports the United States' position. New Mexico, on the other hand, devoted thirty-five pages to a discussion of the relevant history.[6]

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5. The United States has suggested that the fact that the Rio Mimbres adjudication is in state court is the cause of "the mischief" below. It should be noted, however, that there are pending seven similar general adjudications in federal district court in New Mexico, where exactly the same issues have been argued. The decisions of the federal district court with respect to instream flows, recreation, and permittee uses are the same in substance as the state court decisions.

6. Instead of discussing the actual legislative history the United States has repeatedly referred to the subsequent writings of B. E. Fernow, the first Chief of the Forestry Division of the Department of Agriculture, and in discussing the actual language of the two acts in question the United States has avoided the legislative history and sought to exploit certain phrases out of context. For instance, in quoting §24 of the Creative Act of 1891 in its Petition (p.13), the Solicitor General isolates the clause that makes it possible to reserve forest lands having no commercial value.

> Sec. 24. The President of the United States of America may, from time to time, set apart and reserve, in any State or Territory having public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forest, and the

Unable to persuade either the state or federal courts that the history of the relevant legislation supports the proposition that recreation and wildlife protection were valid purposes for which forest lands might have been withdrawn from the public domain before the passage of the Multiple-Use Sustained-Yield Act of June 12, 1960, the United States has argued that reserved rights for these purposes arise under the regulatory provisions of the Organic Administration Act. That the government's logic is in error can be seen in its analysis of the case law dealing with its authority to regulate such activities. For example, in its brief in *State of New Mexico, ex rel. S. E. Reynolds, State Engineer v. Molybdenum Corp. of America,* (Civil No. 9780 U.S.D.C., N.M.), the United States argued as follows:

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6. (Cont'd)

> President shall by public proclamation declare the establishment of such forest and the limits thereof. (Tr. 307).

The United States then alludes to Fernow's *Report of the Chief of the Division of Forestry* (1891), noting his belief that the secondary objects of the forests were aesthetic and recreational. The conclusion the government draws, however, is that because the forests need not be of commercial value and because Fernow wanted to encourage hunting and fishing, "uses of the National Forests involving instream uses and requiring a continued adequate flow of water were considered and implemented." (Transcript of Report, p 309). However, as is clear from a reading of the legislation and its history, there is a less extraordinary explanation of the fact that the forest reserves need not be of commercial value, viz., that the lands were reserved not only for the preservation of economically valuable timber, but also to preserve and manage the watershed in order to ensure a dependable water supply. Prudent watershed management, of course, is desirable wherever it might protect the downstream appropriators from uncontrolled, capricious runoff – regardless of whether the watershed timber has any commercial value. In other words, from the fact that the Creative Act authorized the reservation of forest lands having no commercial value we should not conclude that some forests are reserved for recreation and of necessity must be judicially assured of reserved rights to minimum flows and recreational uses. On the contrary, we should conclude from the express provisions of the Organic Act that all forests were reserved pursuant to existing statutory authority for the protection of downstream water users, and not in order to protect the proprietary interests of the United States in derogation of the rights of others. There is no secondary or supplemental purpose listed in the Act, and none was authorized until the Multiple-Use Sustained-Yield Act of June 12 1960.

The opinion in *McMichael v. United States of America,* 335 F. 2d 283 (9th Cir. 1964) considered the very issue now before this court. In that case appellants argued that certain regulations establishing a wilderness area limiting the use of portions of a National Forest were not authorized under the Organic Administration Act of June 4, 1897. In upholding the regulation as a valid forest purpose the court stated:

> The consistent administrative interpretation of the Act of June 4, 1897, however, has been that while recreational considerations alone will not support the establishment of a National Forest, *they are appropriate subjects for regulation.* Congress has tacitly shown its approval of this interpretation by appropriating the sums required for its effectuation. (Emphasis added) (355 F.2d at 285).

All the Ninth Circuit said, of course, was that the Secretary of Agriculture has the authority under §478 of the Act to make rules and regulations governing the use of wilderness. The court did not conclude, as the United States does, that "the regulation is a valid forest purpose" out of which reservation water rights can arise in behalf of the forest administrators.

Aside from its arguments relating to 16 U.S.C. §475 and 16 U.S.C. §478, the United States has also contended that 16 U.S C. §551 indicates that Congress envisioned broader purposes for forest reservations than the express limitations found in §475. Section 551 reads as follows:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their

> occupancy and use and to preserve the forests thereon from destruction.

In its brief before the New Mexico Supreme Court, the United States stated that "[o]bviously, 'occupancy and use' contemplate more than the two purposes identified by [New Mexico]." However, from the fact that the Secretary of Agriculture is empowered to regulate the many *uses* of forest lands it does not follow that the *purposes* for which national forest lands can be reserved are somehow expanded. On the contrary, it was to preserve the objects or purposes of the forests as they were enumerated in §475 that the Secretary was authorized to regulate occupancy and use.

The history of the legislation shows that the major deficiency of the Creative Act of 1891 was its failure to provide for the regulation of the forests once they were reserved, and it was largely for this reason that the Organic Administration Act of 1897 was passed. (Bassman, *The Organic Act of 1897. A Historical Perspective,* 3 Nat. Res. Law. 503 (1974); "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of Forest Policy for the Forested Lands of the United States to the Secretary of the Interior," May 1, 1897, Sen. Doc. No. 105, 55th Cong., 1st Sess., 1897). Section 551 was intended to remedy this deficiency. In order to insure that the purposes of watershed protection and timber preservation were not undermined or interfered with by the unrelated, but lawful activities in the forests, those activities had to be regulated: ". . . any person [may enter] upon such national forests for all proper and lawful purposes. . ., [provided that such persons] must comply with the rules and regulations" adopted under §551. (16 U.S.C. §478). Accordingly §551 was designed to regulate forest *uses,* and not to somehow equate forest uses with forest *purposes.* If we can draw any conclusion from the fact that §551 was included in the Act, it is that Congress was aware that many of the uses made of forest lands by private individuals might be

inconsistent with the purposes for which the forests were created. The cases which have dealt with §551 support this conclusion. For example, in *United States v. Grimaud,* 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), the issue before the Court was the propriety of the Secretary of Agriculture's regulation of grazing on national forest land:

> Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. *To pasture sheep and cattle on the reservation at will and without restraint might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute.* (Emphasis added)

Both the legislative history and the numerous cases construing the regulatory provisions of the Organic Administration Act, including the decisions of this Court, support the decision of the New Mexico Supreme Court. [See, e.g., *McMichael* and *Grimaud, supra,* and *Light v. United States,* 220 U.S. 523, 31 S. Ct. 485, 55 L.Ed. 570 (1911)]. Despite this inescapable conclusion, the United States has urged that a different result was reached in *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1964).[7] In his Report in that case, the Special Master, the Hon. Simon Rifkind, made reference to certain national forests, including the Gila National Forest in New Mexico, and found:

> They were established for the following purposes: (1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber, (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public. . . . 8 (p. 96; The footnote is Rifkind's)

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7. This argument has also been made in Civil No. 9780 in federal district court in New Mexico, *supra,* to no avail.

The footnote refers the reader to that portion of the transcript upon which Judge Rifkind was basing his finding, viz., two pages of testimony of B. Russell Lyon, Chief of Hydraulics and Water Improvement for the Intermountain Region of the National Forest Service. (*Arizona v. California,* Tr. pp. 16014-16015). A reading of Mr. Lyon's testimony clearly indicates that he was talking about forest *uses* and not the purposes for which forest lands could be withdrawn:

> Q: Mr. Lyon, generally what are the uses which are made of the National Forests?
>
> A: The National Forests are used for . .
> (Tr. 16014).

It is clear from the transcript that the question of whether recreation and other forest uses are valid forest purposes within the meaning of the Organic Act was neither litigated nor decided.

There are other reasons why *Arizona v. California* cannot be considered to have settled the question. In the opinion the Court made the following statement about the Master's resolution of the reserved rights claims of the United States:

> While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled. Rather than adopt the Master's decree with amendments or append our own decree to this opinion, we will allow the parties, or any of them, if they wish, to submit before September 16, 1963, the form of decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court.

The decree ultimately adopted by the Supreme Court made no reference to the purposes for which national forests could be reserved, and the decree proposed by the Master did not specifically state the purposes of the national forests. While the Court

approved the preliminary findings of the Master, his proposed decree was not adopted and neither did the Court specifically adopt his findings and conclusions. In the decree that was adopted, the Court decreed to the Gila National Forest [in the Gila River drainage] reserved waters sufficient, ". . . . to fulfill the purposes of the Gila National Forest. . . ." (*Arizona v. California, supra,* p. 349 U.S.). The purposes were not elaborated, just as they were not litigated, and this Court's holding, in effect, did no more than state the basis of the issue before the New Mexico Supreme Court in this action.

2. The New Mexico Supreme Court's decision does not interfere with the ability of the United States to perfect federally reserved water rights to protect wildlife, environmental, and aesthetic values.

The United States has also argued that this is really a wildlife case controlled by *Cappaert, supra*;

> The forest is, among other things, the wildlife living within it. By denying minimum instream flows for wildlife protection and for the fish that require those amounts of water, the court ignored the relationships among the living things in the forest that preserve the ecological balance and keep the forest healthy. (p. 11).

Rhetoric, however, cannot change the meaning of the Organic Act. In *Cappaert,* the Cappaerts owned a 12,000 acre ranch near Devil's Hole, a limestone cavern reserved from the public domain as a National Monument in which there exists a small pool of water which supports a unique species of desert fish. The United States filed suit to enjoin the pumping of six of the Cappaerts' wells because the pumping was lowering the water level in Devil's Hole and endangering the fish. The question was whether the United States had a reserved water right to maintain the pool. The Court held that the United States did have a

reserved right "necessary to the purpose of the reservation; the purpose included preservation of the pool and the pupfish in it." (S.Ct. 2069).

There is no question in *Cappaert* whether the preservation of the pool and the fish was a purpose for which Devil's Hole could have been withdrawn from the public domain within the meaning of the National Park Service Act. (16 U.S.C. §§1-3). Section one of the Act reads as follows:

> . . . the fundamental purpose of the said parks, monuments, and reservations [is] to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

The answer to the question here was obvious in *Cappaert* – predicated upon the power to reserve lands for the specific purposes expressed in the Act, the United States had a right to preserve the pool "unimpaired" and to maintain "the wild life therein. . . ." If, however, Devil's Hole had been part of a reservation of forest lands under the authority of the Organic Administration Act, it is clear that the United States would have no reserved right:

> The implied reservation of water doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. . . . Here the purpose of reserving Devil's Hole Monument is preservation of the pool."

The purposes of watershed management and timber preservation would not have sufficed.

While the United States cannot properly predicate reserved water rights for recreation and "fish purposes" on withdrawals of land from the public domain under the Organic Administration Act of 1891, there are a number of ways in which such

rights could be established. The Forest Service could posit its claims under the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528, which provides that as of 1960 national forests "shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes." If deemed important enough the United States could establish such rights by withdrawing the forest lands pursuant to the National Park Service Act, *supra*, or by executive order transferring the lands to the National Park Service for concurrent administration under the Act. The United States might also withdraw the beds and banks of the Rio Mimbres and its tributaries under the Wild and Scenic Rivers Act of October 2, 1968, 82 Stat. 906, 16 U.S.C. §1271, et. seq. In short, the New Mexico Supreme Court has not "jeopardized the reserved water rights of the United States in national forests throughout the West." (Petition, p. 6). This is not a case of a state court stubbornly ignoring environmental concerns. On the contrary, like many cases previously decided by this court and numerous circuit and federal district courts, this is a case dealing with the meaning of the Organic Administration Act of 1891.

3. The Petition is untimely.

At trial of the United States' claims for the Gila National Forest the government urged that the determination of its rights for future water uses be postponed until such time as an inventory of such rights could be completed. The district court responded as follows:

> That in light of the right of the United States to water for future needs when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year from the date of this order, specify the priority, amount, purpose and periods and place of use of all such claimed

future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by §75-4-1 to 75-4-8 in N.M.S.A. 1953. (Conclusion No. 12, App. C, p. 21a).

There is now pending a motion before the district court to proceed with the adjudication of the United States' rights for future forest uses. All of the government's claims for water rights relating to watershed management and timber maintenance have not been adjudicated. Until those claims are known and determined a review by this Court would be premature.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 11,094

MIMBRES VALLEY IRRIGATION CO.,
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,
DEFENDANT-APPELLANT,

STATE OF NEW MEXICO,
PLAINTIFF-IN-INTERVENTION-APPELLEE

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
Norman Hodges, District Judge

OPINION

PAYNE, Justice

This suit was filed in 1966 as a private action to enjoin alleged illegal diversions of the Rio Mimbres

which flows through the Gila National Forest in southwest New Mexico. In 1970 the State of New Mexico, on the relation of the State Engineer and pursuant to § 75-4-4, N.M.S.A. 1953 (Repl. Vol. 11, Pt. 2, 1968), filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. The complaint-in-intervention named as defendants all parties claiming any interest in and use of the waters of the Rio Mimbres. The State's motion to intervene was granted and the suit proceeded as a general statutory adjudication of all the water rights on the stream system.

Among the named defendants in the complaint-in-intervention was the United States of America, joined pursuant to 43 U.S.C. § 66 (1970). The United States claimed reserved water rights for minimum instream flows and for recreational purposes within the Gila National Forest. The matter was referred by the trial court to a special master to determine the rights of the parties. The master entered findings of fact and conclusions of law which supported the United States' claim to 6.0 cubic feet per second of water in the Gila National Forest for minimum instream flows and recreational purposes. The State of New Mexico, pursuant to N.M.R. Civ. P. 53(e)(2) [1], objected to the master's report. The district court reversed, holding that the United States had not reserved water rights in the Gila National Forest for

[1] Section 21-1-1(53)(e)(2), N.M.S.A. 1953 (Repl. Vol. 4, 1970).

its claimed purposes. We affirm the decision of the district court.

The "reservation" doctrine, as it applies to federal enclaves, was initially recognized in United States v. Winters, 207 U.S. 564 (1908). The issue decided therein was whether the United States, at the time of the creation of the Fort Belknap Indian Reservation in Montana, had impliedly reserved a water right for future use of the Indians upon those lands. The United States Supreme Court upheld the power of the federal government to reserve the waters and exempt them from appropriation under state laws.

The exact meaning of the principle articulated in the Winters case has been subject to inconclusive debate through the years. It was further clarified, however, in Arizona v. California, 373 U.S. 546 (1963), a case that also involved waters flowing through the Gila National Forest. The United States Supreme Court reaffirmed the viability of the Winters doctrine, and for the first time extended the reservation doctrine to other non-Indian federal enclaves. Although it refused to discuss the non-Indian related claims, the Court said:

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National

> Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

373 U.S. at 601.

More recently the Supreme Court has given additional guidance on the application of the principle of reserved water rights. In Cappeart v. United States, 426 U.S. 128 (1976), the Court stated:

> [W]hen the Federal Government reserves land, by implication it reserves the water rights sufficient to accomplish the purposes of the reservation.
>
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created . . . . (Citations omitted.)

426 U.S. at 139.

> The implied - reservation - of - water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more . . . . (Citation omitted.)

Id. at 141.

The Cappeart decision restricts the application of the reservation doctrine to the limited purposes for which the reservation was created.

The final decree entered in Arizona v. California[2] concludes that the United States has reserved water rights in "quantities reasonably necessary to fulfill the purposes of the Gila National Forest." Applying the Cappeart Rule, we must now determine for what purpose the Gila National Forest was originally established and whether those purposes necessarily require an implied reservation of water.

The Gila National Forest was established by separate presidential proclamation dated March 2, 1899, July 2, 1905, February 6, 1907, June 18, 1908 and May 9, 1910. In subsequent years portions of other national forests were transferred to the Gila National Forest so that it now comprises about 2,787,093 acres of land in southwestern New Mexico. Approximately 92,622 acres of privately owned land is encompassed by the forest. The legislative act under which the establishment of national forests was authorized is the Creative Act of March 3, 1891. 16 U.S.C. § 471 (1970). It reads as follows:

> The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

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[2] 376 U.S. 340, 350 (1964). Decree carrying into effect the United States Supreme Court's prior opinion of June 3, 1963, 373 U.S. 546.

The statute did not set forth the purposes for which the forests were withdrawn nor did it set up the means of administration of the forests. Further congressional action to remedy this situation resulted in the passage of the Organic Act of 1897. 16 U.S.C. § 475 (1970); see Bassman, "The 1897 Organic Act: A Historical Perspective," 7 Nat.Res.Law. 503 (1974). The pertinent provision of that Act reads as follows:

> § 475. Purposes For Which National Forests May Be Established And Administered.
>
> . . . No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.

The United States asserts that additional recreational purposes were envisioned when the act was passed. It likewise argues that minimum instream flows are necessary for aesthetic, environmental, rec-

reational and "fish" purposes. We do not disagree with the objective of preserving the aesthetic and environmentally pleasing qualities of the forests and we appreciate the availability of the forests for recreational purposes. We cannot agree, however, that these objectives come within the original intent of Congress when creating national forests. The United States would equate these other "uses" of the forest as part of the original "purposes" for which it was established, and argues that the "uses" and "purposes" of the forest are one and the same. Congress has provided that the Secretary of Agriculture is authorized "to regulate . . . occupancy and use and to preserve the forests thereon from destruction . . ." 16 U.S.C. § 551 (1970). We are urged to recognize this section of the Code as support for the proposition that the words "occupancy and use" contemplate more than the limited purposes set out in the Organic Act. We cannot take such liberty with the expressions of Congress. There is little doubt that if secondary uses such as grazing, mining or recreation conflict with the primary purposes of assuring watershed protection or timber preservation, those secondary uses would not be permitted to continue. United States v. Grimaud, 220 U.S. 506 (1911); Light v. United States, 220 U.S. 523 (1911); United States v. Hunt, 19 F.2d 634 (N.D. Ariz. 1927); Honchok v. Hardin, 326 Fed. Supp. 988 (D. Md. 1971). The fact that Congress has opened the national forests for the many diversified uses which are now allowed does not ex-

pand the purposes for which they were originally created.

If there remains any question concerning the applicability of the "reservation" doctrine for the uses now claimed by the United States, it is dispelled by the Multiple-Use Sustained-Yield Act of 1960. 16 U.S.C. § 528 (1970). This act includes the following proviso:

> It is the policy of the Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title.

The United States argues that this enactment by Congress clarifies and is further support for its position that these additional purposes have always been considered as integral parts of the whole purpose of the Creative and Organic Acts. A similar argument was made in West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975), wherein the Court stated:

> In effect, appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds. First of all, it is at odds with the well established rule that repeal of a statute by implication is not favored and,

as recently stated by the Court in Morton v. Mancari, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974):

> "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

In addition to the foregoing principle, Section 1 of the Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language:

> "The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. § 475)."

> Appellants' argument in this respect also elides the fact that in and out of Congress there has not been unanimous agreement with respect to the interpretation and application of the Multiple-Use Act. Over a decade after its passage controversy over its meaning and intent, as well as the management practices of the Forest Service, . . . has continued unabated.
>
> . . . .
>
> [F]rom our review of the material at hand we are satisfied that in enacting this legislation Congress did not intent [sic] to jettison or repeal the Organic Act of 1897. We are equally satisfied that this act did not constitute a ratification of the relatively new policy of the Forest Service
>
> . . .

522 F.2d at 953-54.

The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be "supplemental to" the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897.

We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated.

We are aware of the advancing environmental and aesthetic concerns related to the use of our natural resources. Had the congressional enactments and their interpretations by the Supreme Court given us leeway so as to interpret more broadly the intent of the Creative and Organic Acts we may have been persuaded to decide differently. However, the intent of Congress is clear and we must follow it.

An additional matter raised in this appeal is whether the water rights used by permittees of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright to the United States. The prior

discussion in this opinion reveals that the United States does not have reserved water rights in the forests for these permitted uses. It necessarily follows that water rights must be perfected and held by the permittee in accordance with state law.

We affirm the trial court.

IT IS SO ORDERED.

/s/ H. Vern Payne
H. VERN PAYNE
Justice

WE CONCUR:

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Justice

/s/ Mack Easley
MACK EASLEY
Justice

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
LUNA COUNTY

Monday, May 23, 1977

No. 11,094

MIMBRES VALLEY IRRIGATION CO.,
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES,

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,
DEFENDANT-APPELLANT,
STATE OF NEW MEXICO,
PLAINTIFF-IN-INTERVENTION-APPELLEE.

This cause having heretofore been argued, submitted and taken under advisement, and the Court now being sufficiently advised in the premises announces its decision by Mr. Justice Payne, Mr. Justice Sosa and Mr. Justice Easley concurring, affirming the judgment of the trial court for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS ORDERED that the judgment of the District Court in and for the County of Luna, whence this cause came into this Court, be and the same is hereby affirmed, and the cause be and the same is hereby remanded to the said District Court of Luna County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

APPENDIX C

IN THE DISTRICT COURT
OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF LUNA
STATE OF NEW MEXICO

No. 6326

MIMBRES VALLEY IRRIGATION CO., PLAINTIFF,

v.

TONY SALOPEK, ET AL., DEFENDANTS,

STATE OF NEW MEXICO, PLAINTIFF-IN-INTERVENTION.

[Filed June 4, 1976]

ORDER SUSTAINING OBJECTIONS AND MODIFYING FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on to be heard upon the Findings of Fact and Conclusions of Law of the Special Master, filed herein on May 2, 1975, and the State of New Mexico, plaintiff-in-intervention, having filed its Objections thereto on May 15, 1975, the parties having been heard on said Objections, and upon due deliberation and being fully advised,

IT IS ORDERED that the Objections are hereby sustained and that the Special Master's Findings of Fact and Conclusions are modified in accordance herewith, as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:

a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.

b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres Watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.: Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.

c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T.

19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.

d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13, and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.

e. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W., Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.

Cor. No. 8 on the South line of the NE ¼, said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13′W., 1098.80 ft. to Cor. No.

9, a point of curve; thence Northwesterly on a 7°50′ curve to the left (chord bearing and distance N.45°54′W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE ¼, said Section 35; thence N.1°43′W., 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

7. That of that portion of the SW ¼ of Section 25, the SE ¼ of Section 26, the NE ¼ of Section 35, and the NW ¼ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE ¼, said Section 26, bears N.75°30′W., 949.62 ft. dist.; thence S.80°00′E., 669.00 ft. to the Northeast Cor., thence S.9°55′W., 960 ft. to the Southeast Cor., thence N. 81°00′W., 669.00 ft. to the Southwest Cor.; thence N.9°57′E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

8. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of § 75-4-2 to 75-4-8 N.M.S.A., 1953.

2. That § 75-4-8 N.M.S.A., 1953, requires that the decree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."

3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.

4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.

5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding No. 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.

6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Find-

ing 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.

7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.

8. That in addition to the above-listed present uses made by the United States, or its permittees, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

9. That with respect to the above-listed uses in the Gila National Forest where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom should be adjudicated to the permittee under the law of prior appropriation and not to the United States.

10. That recreation is not among the purposes for which the above-described Gila National Forest lands were or could have been withdrawn from the public domain, and the United States has no reserved water rights in said forest for recreational purposes.

11. That the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain.

12. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year from the date of this order, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A. 1953.

DONE this 26th day of March, 1976.

/s/ Norman Hodges
HON. NORMAN HODGES
District Judge

APPENDIX D

IN THE DISTRICT COURT
OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF LUNA
STATE OF NEW MEXICO

No. 6326

MIMBRES VALLEY IRRIGATION CO., PLAINTIFF,

v.

TONY SALOPEK, ET AL., DEFENDANTS,

STATE OF NEW MEXICO, PLAINTIFF-IN-INTERVENTION.

[Filed May 5, 1975]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on October 9, 1973, and the Special Master having heard the evidence and argument of the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the require-

ments and purposes of the reservations included in the following withdrawal orders:

a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: land located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, T. 14S., R. 10W., N.M. P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.

b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.: Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21,

28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.

c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.

d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13 and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.

3. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W.; Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.

2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permitees in the Mimbres River Watershed within the Gila National Forest:

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
1 15S 11W	024	2.00		Fish	3- 2-1899
— 16S 10W	200		2.21	Stockwater	7-21-1905
— 16S 9W	206		.51	Stockwater	7-21-1905
4 16S 9W	207		.01	Domestic Residential	7-21-1905
— 16S 9W	225		3.09	Stockwater	7-21-1905
16 19S 9W	226		.03	Domestic Recreational	7-21-1905
18 16S 9W	229		.03	Domestic Recreational	7-21-1905
18 16S 9W	230		.03	Domestic Recreational	7-21-1905
19 16S 9W	231		.01	Domestic Recreational	7-21-1905
— 16S 10W	249		1.00	Stockwater	6-18-1908
— 17S 9W	264		3.52	Stockwater	7-21-1905
— 17S 9W	281		3.21	Stockwater	7-21-1905
— 18S 9W	283		0.98	Stockwater	1910
— 18S 9W	307		3.57	Stockwater	5-9-1910
— 14S 10W	500		9.11	Stockwater	3-2-1899
27 14S 11W	511	2.00		Fish	3-2-1899
28 14S 11W	523		2.50	Stockwater	3-2-1899
35 14S 10N	535		.02	Domestic Residential	3-2-1899
35 14S 10W	536		.02	Stockwater	3-2-1899
— 15S 11W	544		6.97	Stockwater	3-2-1899
— — —	588		8.82	Stockwater	3-2-1899
— 16S 10W	587		12.65	Stockwater	3-2-1899
31 15S 11W	614		3.00	Domestic Recreational	3-2-1899
7 16S 11W	639		6.87	Domestic Residential	5-9-1910
— 16S 12W	668		1.89	Stockwater	7-21-1905
— 16S 11W	674		2.94	Stockwater	7-21-1905
— 17S 12W	689		1.09	Stockwater	7-21-1905
— 17S 12W	698		4.94	Stockwater	7-21-1905
— 16S 12W	726		.63	Stockwater	7-21-1905
1 15S 11W	786	2.00		Fish	3-2-1899
7 16S 13W	800		.51	Stockwater	7-21-1905
— 17S 13W	804		2.64	Stockwater	3-2-1899
— — —	881		6.50	Roadwater	1905
10 17S 16W	901		0.12	Domestic	1908

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
17 17S 14W	904		.10	Wildlife	6-18-1908
— 12S 15W	907		1.65	Stockwater	2-6-1907
17 17S 14W	946		.01	Domestic	1908
Total		6.00	91.18		

3. That there are no private junior appropriators upstream of the above-listed instream uses numbered 024, 511, and 786.
4. That said instream uses numbered 024, 511, and 786 can be made without raising the possibility of interference with the rights of junior upstream appropriators.
5. That said instream uses numbered 024, 511, and 786 can be made without interferring with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators.
6. That the United States owns lands as follows which were reserved for military use as the Ft. Bayard Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to

a point thirteen chains south of the north line of the southwest ¼ of Section 10; thence east to the west line of northeast ¼ of southwest corner of same; thence east along the south line of same and along south line of northwest ¼ of southeast ¼ of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast ¼ of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

7. That on January 2, 1941, all of the lands of the Ft. Bayard Military Reservation except the SE ¼ of Section 25, the SE ¼ of Section 26, the NE ¼ of Section 35, and the NW ¼ of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U. S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.
8. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW ¼ of Section 25, the SE ¼ of Section 26, the NE ¼ of Section 35,

and the NW ¼ of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.

9. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of Agriculture:

> All that part of the SW ¼, Section 25; SE ¼, Section 26; NE ¼, Section 35; and NW ¼, Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE ¼, said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29° 43′E., 37.30 ft. to Cor. No. 1-B; thence N. 60°17′E., 21.25 ft. to Cor. No. 1-C; thence N.29°43W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW ¼, said Section 25; thence S.18°30′E., 2380.00 ft. to Cor. No. 3; thence S.47°59′W., 1573.40 ft. to Cor. No. 4; thence S.23°00′W., 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW ¼, said Section 36; thence S.89° 03′W., 2504.57 ft. to Cor. No. 8 on the South line of the NE ¼, said Section 35 and in the

center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13'W., 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE ¼, said Section 35; thence N.1°43'W., 3493-.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

10. That of that portion of the SW ¼ of Section 25, the SE ¼ of Section 26, the NE ¼ of Section 35, and the NW ¼ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

    Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE ¼, said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor., thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

11. That the projected future needs of the reserved lands of the United States specified above are significant and substantial in quantity as compared to present uses and not in the category of minor, modest, or insignificant in amount.

12. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of §§ 75-4-2 to 75-4-8 N.M.S.A., 1953.
2. That § 75-4-8 N.M.S.A., 1953, requires that the degree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."
3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S. C.A. § 666.
4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.

5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.
6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Finding 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.
7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.
8. That in addition to the above-listed present uses adjudicated to the United States, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such

additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

9. That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permitee and not to the United States.
10. In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511, and 786, and consequently, because said federal uses can be made without interferring with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.
11. That among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.
12. That until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress

authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.

13. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year after the order is entered on this report, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

IT IS SO ORDERED.

IRWIN S. MOISE
Special Master

May 2, 1975.

APPENDIX E

STATUTES INVOLVED

Act of July 26, 1866, Ch. 262 § 9, 14 Stat. 253, 43 U.S.C. § 661 (1952):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States. . . .

. . . Sec. 9. *And be it further enacted,* That whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . .

Act of July 9, 1870, Ch. 235 § 17, 16 Stat. 218, 30 U.S.C. § 52 (1964):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act granting the right of way to ditch and canal owners over the public lands, and for other purposes, approved July twenty-six,

eighteen hundred and sixty-six, be, and the same is hereby, amended by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act. . . .

. . . Sec. 17. *And be it further enacted,* That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. . . .

Creative Act of March 3, 1891, Ch. 561 § 24, 26 Stat. 1103, 16 U.S.C. §471 (1974):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act to amend an act entitled 'An act to encourage the growth of timber on the Western prairies," approved June fourteen, eighteen hundred and seventy eight, and all laws supplementary thereto or amendatory thereof, be, and the same are hereby, repealed: . . . .

. . . Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation,

declare the establishment of such reservations and the limits thereof.

Organic Administration Act of June 4, 1897, Ch. 2 §1, 30 Stat. 34, 16 U.S.C. §475, Ch 2 §1, 30 Stat. 36, 16 U.S.C. §§478 & 481 (1974):

. . . All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. . . . (§ 475)

. . . Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything herein prohibit any person from entering upon such national forests

for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests. . . . (§ 478)

. . . All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder. (§ 481)

Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. § 528-531, as amended by Pub. L. 94-588, 90 Stat. 2949, 2962:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. 475). Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

Sec. 2. The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple

use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act.

Sec. 3. In the effectuation of this Act the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

Sec. 4. As used in this Act, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the

national forests without impairment of the productivity of the land.

Sec. 5. This Act may be cited as the "Multiple-Use Sustained-Yield Act of 1960."